

**Malaysian Assurance Alliance Bhd v
Chong Nyuk Lan (administrator of the estate of
Liew Kin On, deceased)**

HIGH COURT (TAWAU) — CIVIL APPEAL NO T(12)–06 OF 2001
RICHARD MALANJUM J
20 AUGUST 2002

Insurance — Life insurance — Formation of contract and commencement of cover — Reinstatement of policy after original policy had lapsed for late payment of premium — Claim for payment of insurance policy rejected by insurer — Whether insurer can dispute validity of life policy — Whether s 147(4) of the Insurance Act 1996 was applicable — Whether the two year period specified in s 147(4) within which an insurer can dispute validity of life policy commenced from the time the policy was originally effected or from the time the policy was reinstated — Insurance Act 1996 s 147(4)

Insurance — Life insurance — Duty of disclosure — Claim for payment of insurance policy rejected by insurer on ground of non-disclosure of material facts by deceased — Trial judge concluded that insurer had failed to prove non-disclosure of material facts on balance of probabilities — Whether appellate court should be slow in reversing findings of trial judge — Whether there was any justification for court to interfere with findings of facts by trial judge

On 22 February 1994, the deceased signed for a life insurance policy that commenced on 1 February 1994. On 1 February 1996, the premium was payable but it was not paid until 19 March 1996 thereby resulting in the policy having lapsed. The deceased was required to sign a 'Long Form Health Certificate' with a statement of the deceased that his health was not impaired in anyway. Thereupon the policy was reinstated to take effect from 19 September 1996. On 1 October 1997, the deceased was pronounced dead following a heart attack a day earlier. A claim for the payment of the insurance policy by the plaintiff, as an administrator of the deceased, was rejected by the defendant on the ground that there was a non-disclosure of material facts on the part of the deceased. This culminated in the suit being commenced. It was in evidence that in 1997, the deceased had gone to see one Dr Edward Sia ('DW2'), complaining of heart palpitations. DW2 testified that the deceased informed him of his taking medication for hypertension. However, it was the finding of the trial judge, inter alia, that DW2 could not be certain as to when the diagnosis for the hypertension and elevated cholesterol was carried out and when such ailments were actually detected and hence, it was concluded that the defendant had failed to prove on the balance of probabilities that there was a non-disclosure of material facts on the part of the deceased. The trial judge accordingly allowed the plaintiff's claim. This was the defendant's appeal against the decision of the trial judge. There was also a cross appeal by the plaintiff against the finding of the trial judge wherein it was ruled that s 147(4) of the Insurance Act 1996 ('the Act') had no application to the present case. Section

- A 147(4) of the Act stipulated that ‘A licensed life insurer shall not dispute the validity of a life policy after the expiry of two years from the date on which it was effected on the ground that a statement made or omitted to be made in the proposal for insurance or in a report of a doctor, referee, or any other person, or in a document leading to the issue of the life policy, was inaccurate or false or misleading unless the
- B licensed life insurer shows that the statement was on a material matter or suppressed a material fact and that it was fraudulently made or omitted to be made by the policy owner’. There was also a preliminary objection taken up by the plaintiff’s counsel in respect of the attempt by the defendant’s counsel to include documents (‘the said documents’) that had not been admitted as exhibits in the trial.
- C

Held, dismissing the defendant’s appeal and allowing the plaintiff’s cross appeal:

- D (1) Section 147(4) of the Act was applicable in the determination of the instant appeal. The computation of the two year period under s 147(4) of the Act should start from the time the policy was originally effected regardless of lapse or renewal of the said policy. Therefore, in the present case, the policy was effected on 1 February 1994 and the claim for payment came in 1997 with the death of the insured. The two year period had definitely expired, and the defendant should be precluded from contesting the validity of the policy on the ground of false and non-disclosure of material facts unless fraud was alleged. Here, the defendant did not pursue the assertion of fraud on the part of the deceased in its defence (see pp 654B–C, 655B–C); *Mithoolal v Life Insurance Corporation of India* 1962 AIR 814 followed.
- E
- F (2) Even if s 147(4) of the Act was not applicable, this appeal should be dismissed in that the trial judge’s conclusion was arrived at from findings of facts based on the evidence adduced before him. As an appellate court, the High Court should be slow in reversing such findings. Further, there was no justification for the High
- G Court to interfere with the findings of facts by the trial court (see p 655D–E).
- H (3) The said documents should not be admitted as they were not properly introduced and tendered during the trial. To do so at the appeal would be highly prejudicial to the plaintiff as he would be deprived of the opportunity to further examine its maker (see p 656G).

[Bahasa Malaysia summary]

- I Pada 22 Februari 1994, si mati telah menandatangani satu polisi insuran hayat yang bermula pada 1 Februari 1994. Pada 1 Februari 1996, premium perlu dibayar tetapi tidak dibayar sehingga 19 Mac 1996 yang mengakibatkan polisi tersebut luput. Si mati dikehendaki

menandatangani satu 'Sijil Kesihatan Long Form' dengan kenyataan si mati bahawa kesihatan beliau tidak terjejas dalam apa keadaanpun. Seterusnya polisi tersebut dihidupkan semula dan berkuatkuasa daripada 19 September 1996. Pada 1 October 1997, si mati diumumkan meninggal dunia berikutan serangan jantung sehari sebelumnya. Satu tuntutan untuk pembayaran polisi insuran tersebut oleh plaintif, sebagai pentadbir si mati, telah ditolak oleh defendan atas alasan bahawa fakta-fakta material tidak didedahkan di pihak si mati. Ini berkesudahan dengan guaman yang dimulakan. Ia terdapat dalam keterangan bahawa dalam tahun 1997, si mati telah pergi berjumpa dengan Dr Edward Sia ('DW2'), mengadu mengalami debaran jantung. DW2 memberi keterangan bahawa si mati memaklumkan kepada beliau tentang pengambilan ubat untuk hipertensi. Namun begitu, ia adalah penemuan hakim percicaraan, antara lain, bahawa DW2 tidak pasti bila diagnosis untuk hipertensi dan paras kolesterol yang tinggi telah dijalankan dan bila penyakit-penyakit berikut sebenarnya dikesan dan justeru itu, ia diputuskan bahawa defendan telah gagal untuk membuktikan atas imbalan kebarangkalian bahawa fakta-fakta material tidak didedahkan oleh pihak si mati. Hakim percicaraan dengan wajarnya telah membenarkan tuntutan plaintif. Ini adalah rayuan defendan terhadap keputusan hakim percicaraan. Terdapat juga satu rayuan balas daripada plaintif terhadap penemuan hakim percicaraan di mana ia telah memutuskan bahawa s 147(4) Akta Insuran 1996 ('Akta tersebut') tidak terpakai dalam kes semasa. Seksyen 147(4) Akta tersebut menyatakan bahawa 'A licensed life insurer shall not dispute the validity of a life policy after the expiry of two years from the date on which it was effected on the ground that a statement made or omitted to be made in the proposal for insurance or in a report of a doctor, referee, or any other person, or in a document leading to the issue of the life policy, was inaccurate or false or misleading unless the licensed life insurer shows that the statement was on a material matter or suppressed a material fact and that it was fraudulently made or omitted to be made by the policy owner'. Terdapat juga satu bantahan awal yang dibuat oleh peguam plaintif berhubung cubaan peguam defendan untuk mengemukakan dokumen-dokumen ('dokumen-dokumen tersebut') yang tidak dimasukkan sebagai ekshibit-ekshibit dalam percicaraan.

Diputuskan:

- (1) Seksyen 147(4) Akta tersebut adalah terpakai dalam menentukan rayuan semasa. Cara pengiraan tempoh dua tahun di bawah s 147(4) Akta tersebut sepatutnya bermula daripada masa polisi tersebut mula berkuatkuasa tidak kira polisi tersebut telah luput atau diperbaharui. Oleh itu, dalam kes ini, polisi tersebut mula berkuatkuasa pada 1 Februari 1994 dan tuntutan untuk pembayaran tiba pada tahun 1997 dengan kematian orang yang

- A** diinsurankan. Tempoh dua tahun tersebut sememangnya telah luput, dan defendan sepatutnya dihalang daripada mencabar kesahan polisi tersebut atas alasan fakta-fakta material adalah palsu dan tidak didedahkan kecuali terdapat pengatahan fraud. Di sini, defendan tidak memburu penegasan fraud oleh pihak si mati dalam pembelaannya (lihat ms 654B–C, 655B–C).
- B** (2) Walaupun s 147(4) Akta tersebut tidak terpakai, rayuan ini sepatutnya ditolak sebab keputusan hakim perbicaraan dirumuskan daripada penemuan fakta-fakta berdasarkan keterangan yang dikemukakan di hadapan beliau. Sebagai satu mahkamah rayuan, Mahkamah Tinggi sepatutnya lambat dalam mengakaskan penemuan-penemuan sedemikian. Tambahan lagi,
- C** tiada justifikasi untuk Mahkamah Tinggi campur tangan dengan penemuan-penemuan fakta-fakta oleh mahkamah perbicaraan (lihat ms 655D–E).
- D** (3) Dokumen-dokumen tersebut tidak sepatutnya dikemukakan kerana tidak diperkenal dan dikemukakan dengan betul semasa perbicaraan. Untuk berbuat demikian semasa rayuan adalah amat prejudis kepada plaintif kerana beliau akan terkilang peluang untuk memeriksa selanjutnya pembuat dokumen-dokumen tersebut (lihat ms 656G).]
- E** [Editorial Note: The appellant has appealed to the Court of Appeal vide Civil Appeal No S–08–245 of 2002.]

Notes

- F** For cases on the duty of disclosure of life insurance, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 140–141.
- For cases on the formation of life insurance contract and commencement of cover, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 142–143.

G Cases referred to

- Chong Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377 (refd)
- Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 (refd)
- Handler v Mutual Reserve Fund Life Association* (1904) LT 192 (refd)
- H** *Jafaar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 (refd)
- Leong Kum Whay & Anor v American International Assurance Ltd* [1999] 1 MLJ 24 (refd)
- Mithoolal v Life Insurance Corporation of India* 1962 AIR 814 (folld)
- I** *National Mutual Life Assocrn of Australasia v Kidman* (1905) 3 CLR 160 (refd)
- Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87 (refd)

Legislation referred to

Insurance Act 1938 [India] s 45

Insurance Act 1963 s 15C(4)

Insurance Act 1996 s 147(4)

A**Appeal from:** Civil Case No (52) 318 of 1999 (Sessions Court, Tawau)**B***Brenndon Soh (Ronny Cham & Co)* for the appellant.*Henry Lim (Shim Pang & Co)* for the respondent.

Richard Malanjum J: The matter before me is an appeal by the appellant/defendant against the decision of the learned sessions court judge at Tawau given on 14 April 2001 allowing the claim of the plaintiff as an administrator of the estate of Liew Kin On, deceased.

C

There is also a cross appeal by the respondent/plaintiff against the finding of the trial judge wherein it was ruled that s 147(4) of the Insurance Act 1996 ('the Act') has no application to the present case.

D

It was the contention of learned counsel for the respondent/plaintiff that s 147(4) of the Act should apply, and if the correct interpretation of the section is given coupled by the fact that the appellant/defendant abandoned the plea of fraud prior to the commencement of the trial, then there should be no longer any doubt on the entry of the judgment for the respondent/plaintiff by the trial judge albeit for a different reason. It was further submitted that the determination of this issue should dispose of the appeal proper.

E

There is also a preliminary objection taken up by the learned counsel for the respondent/plaintiff against the appeal proper on the basis that it suffered a fatal defect namely the attempt to include documents (pp 143–147 of the appeal record) that were not admitted as exhibits.

F

In response to these attacks, learned counsel for the appellant/defendant argued that those documents that were said to be not part of the exhibits of the case should be considered as having been admitted since they were referred to during the trial and were in the bundle of agreed documents, with their existence not in dispute although the contents were not agreed.

G

As for the appeal proper, learned counsel for the appellant/defendant submitted that this court, although an appellate court, should interfere with the findings of facts by the trial court since they were not based on the credibility of the witnesses called but on the cold prints of the documentary evidence. It was further submitted that there was enough justification to come to a finding that there was a fatal non-disclosure of material facts, namely that the deceased was suffering from hypertension and elevated cholesterol level, in the 'Long Form Health Certificate' submitted for the reinstatement of the insurance policy of the deceased.

H**I**

In respect of the cross appeal of the respondent/plaintiff, it was submitted for the appellant/defendant that the reinstatement of the

A insurance policy constituted a new contract and thus the provision of s 147(4) of the Act did not apply.

B Briefly the following facts were not in dispute, namely, that on 22 February 1994, the deceased signed for a life insurance policy for the sum of RM200,000 that commenced on 1 February 1994 and would have matured on 1 February 2056 or payable upon his death to his nominated beneficiary. The policy premium was payable annually in advance.

C On 1 February 1996, the premium was payable but it was not paid until 19 March 1996 thereby resulting in the policy having lapsed. The deceased was therefore required to sign a 'Long Form Health Certificate' with cl 6 therein as a statement of the deceased that his health was not impaired in any way. Thereupon, the policy was reinstated vide a letter from the appellant/defendant dated 24 September 1996 to take effect from 19 September 1996.

D On 1 October 1997, the deceased was pronounced dead following a heart attack a day earlier. A claim for the payment of the policy of the deceased by the respondent/plaintiff was rejected by the appellant/defendant culminating in the suit being commenced.

E Meanwhile, it was in evidence that in 1997, the deceased saw Dr Edward Sia ('DW2'), complaining of heart palpitations. It was also the testimony of DW2 that the deceased informed him of his taking medication for hypertension. However, it was the finding of the trial judge, inter alia, that DW2 could not be certain as to when the diagnosis for the hypertension and elevated cholesterol was carried out and when such ailments were actually detected and hence, it was concluded that the appellant/defendant failed to prove on the balance of probabilities that there was a non-disclosure of material facts on the part of the deceased.

F Having perused the materials before me and having considered the respective contentions of learned counsel for the parties, I am of the view that I should first deal with the issue raised in the cross appeal of the respondent/plaintiff. I am inclined to agree that s 147(4) of the Act is relevant in the determination of the appeal proper. The Act is applicable to begin with as it came into force on 1 January 1997. Prior to the Act, there was the Insurance Act 1963, but even that legislation was amended initially with s 15C(4) wherein the contestability refers to the time which the policy was issued or reinstated by the insurer and the period was for three years. That was subsequently re-amended and to took effect from 1 April 1978 wherein the earlier reference to time of issuance was deleted and replaced with the phrase 'the time the policy was effected'. And that was kept by the Act in s 147(4).

Now s 147(4) of the Act reads:

I A licensed life insurer shall not dispute the validity of a life policy after the expiry of two years from the date on which it was effected on the ground that a statement made or omitted to be made in the proposal for insurance or in a report of a doctor, referee, or any other person, or in a document leading to the issue of the life policy, was inaccurate or false or misleading unless the licensed life insurer shows that the statement was on a material matter or

suppressed a material fact and that it was fraudulently made or omitted to be made by the policy owner.

A

In the case of reinstatement of an insurance policy, the crucial question is under s 147(4) of the Act, when is the effective period of the policy? If it is from the time of the original issuance of the policy and that reinstatement does not create a new contract, then it would mean that the computation of the two year period under that section is quite a disadvantage to an insurer.

B

Learned counsel for the appellant/defendant argued that a reinstatement of a policy constituted a new contract and thus computation of the two year period should start from the reinstatement date and not from the original date of issuance of the policy. He relied on the following cases:

C

- (i) *Handler v Mutual Reserve Fund Life Association* (1904) LT 192;
- (ii) *National Mutual Life Assocn of Australasia v Kidman* (1905) 3 CLR 160;
- (iii) Wicken's *The Law of Life Insurance in Australia* (6th Ed) 1990.

D

For the respondent/plaintiff, the cases of *Mithoolal v Life Insurance Corporation of India* 1962 AIR 814 and *Leong Kum Whay & Anor v American International Assurance Ltd* [1999] 1 MLJ 24 were referred to in support of the contention that the computation of the two year period as stipulated in the said section should start from the original date the policy was effected.

E

In respect of *Mithoolal*, the Indian Supreme Court was considering s 45 of the Indian Insurance Act 1938. That section reads:

No policy of life insurance effected before the commencement of this Act shall after the expiry of two years from the date of commencement of this Act and no policy of life insurance effected after the coming into force of this Act shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy holder and that the policy holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose ...

F

G

The foregoing section is in pari materia with s 147(4) of the Act, and the Indian Supreme Court, when interpreting s 45 in *Mithoolal*, stated thus:

H

Whether the revival of a lapsed policy constitutes a new contract or not for other purposes, it is clear from the wording of the operative part of s 45 that the period of two years for the purpose of the section has to be calculated from the date on which the policy was originally effected ...

Similarly, in *Leong Kum Whay* it was held that for the first insurance policy the computation of the two year period for the purpose of the re-amended s 15C(4) of the 1963 Act should be from the original date it was first

I

A effected. Of course in that case, there was no question of reinstatement of the policy and hence the court was not troubled with the issue of whether there was a new contract created.

B Having given serious consideration to the opposing contentions of learned counsel for the parties, I am inclined to accept the position of the law as regards s 147(4) of the Act as interpreted in *Mithoolal* and that is to say that the computation of the two year period should start from the time the policy was originally effected regardless of lapse or renewal of the said policy.

C Accordingly, in the present case, the policy was effected on 1 February 1994 and the claim for payment came in 1997 with the death of the insured. The two year period has definitely expired, and the appellant/defendant should be precluded from contesting the validity of the policy on the ground of false and non-disclosure of material facts unless fraud is alleged. In this case, there is no denial that the appellant/defendant in its defence did not pursue the assertion of fraud on the part of the insured/deceased. Thus, it should not be allowed to have the benefit of the second limb of the said s 147(4) of the Act.

D For the foregoing reason alone, I should dismiss this appeal.

E In the event that I am wrong and that s 147(4) is not applicable, I am also of the view that this appeal should be dismissed in that the conclusion of the trial court was derived from findings of facts as mentioned hereinabove based on the evidence adduced before it. As an appellate court, this court should be slow in reversing such findings. And having perused the materials that learned counsel for the appellant/defendant urged this court to consider, I am not convinced that there is justification for this court to interfere with the findings of facts by the trial court (see *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212; *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87).

G As regards the documents that learned counsel for the appellant/defendant requested this court to consider as exhibits, I am of the view that they should not be admitted as such since they were not properly introduced and tendered during the trial. To do so now at the appellate stage would be highly prejudicial to the opposing party as it would be deprived of the opportunity to further examine its maker or those who had dealt with them. And I do not think the position of those documents in this case could be distinguished from those in the case of *Chong Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377. Indeed, even in the case of *Jafaar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693, the requirement of mutual agreement of the parties was a condition precedent before the formality in the tendering of documents as exhibits could be relaxed. Hence, in the present case, since there was no document properly tendered as an exhibit to substantiate the assertion and allegation by the appellant/defendant, the issue of non-disclosure of material fact should not arise at all.

This appeal of the appellant/defendant should therefore be dismissed with costs and the cross appeal by the respondent/plaintiff is allowed. **A**

Defendant’s appeal dismissed and plaintiff’s cross appeal allowed.

Reported by Lim Lee Na **B**

C

D

E

F

G

H

I